

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In re:)
Request of Cellular Communications)
of Puerto Rico, Inc. to Hold an)
Auction to License Cellular RSA)
No. 727A, Ceiba, Puerto Rico)

File No. RM-8897

To: The Commission

**COMMENTS OF CRYSTAL COMMUNICATIONS SYSTEMS ON
PETITION FOR DECLARATORY RULING OR RULEMAKING
OF CELLULAR COMMUNICATIONS OF PUERTO RICO, INC.**

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SUMMARY

All significant factors for determining what method of selecting licensees for the Unlicensed Markets would best serve the public interest weigh in favor of lotteries. By using lotteries the Commission will ensure the shortest time-frame for selecting permanent licensees for the Unlicensed Markets. The use of lotteries would be consistent with the intent of Congress and with prior Commission practices. It would also demonstrate the Commission's commitment to treating the persons who participate in its proceedings fairly. In contrast, a shift to auctions would ensnare the Unlicensed Markets in year of litigation testing the validity of the Commission's action. Nor would auctions produce substantial benefit for the Treasury. Because any licenses awarded by auction would be subject to divestment by the courts, the prices paid at auction would likely be only a small fraction of the actual value of the licenses.

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Crystal Communications Systems ("Crystal"), Block A licensee of Oregon RSA No. 1 - Clatsop, and an applicant for the Block A licenses in cellular markets where the Block A license has never been granted (the "Unlicensed Markets"), by its attorney, hereby files comments in the above-captioned proceeding. Crystal urges the Commission to dismiss summarily the Petition for Declaratory Rulemaking or, in the Alternative, for Rulemaking (the "Petition") of Cellular Communications of Puerto Rico ("CCPR") and to reissue the Lottery Notice of July 12, 1996.¹

All significant factors for determining what method of selecting licensees for the Unlicensed Markets would best serve the public interest weigh in favor of

¹ *Lottery Notice, FCC to Hold Domestic Public Cellular Telecommunications Service Lottery for RSA Markets in Which Previous Winner Was Defective* (July 12, 1996) (the "Lottery Notice"). The Lottery Notice announced that the Commission would select the Block A licensee for Polk, AR; Monroe, FL; Goodhue, MN; Barnes, ND; Bradford, PA; and Ceiba, PR by lottery on September 18, 1996.

lotteries. By using lotteries the Commission will ensure the shortest time-frame for selecting permanent licensees for the Unlicensed Markets. The use of lotteries would be consistent with the intent of Congress and with prior Commission practices. It would also demonstrate the Commission's commitment to treating the persons who participate in its proceedings fairly. In contrast, a shift to auctions would ensnare the Unlicensed Markets in year of litigation testing the validity of the Commission's action. Nor would auctions produce substantial benefit for the Treasury. Because any licenses awarded by auction would be subject to divestment by the courts, the prices paid at auction would likely be only a small fraction of the actual value of the licenses.

I. THE PUBLIC INTEREST REQUIRES THE COMMISSION TO PROCEED IMMEDIATELY TO SELECT LICENSEES BY LOTTERY IN ALL REMAINING UNLICENSED MARKETS

The Unlicensed Markets have already languished for eight years with only a single facilities-based cellular carrier. Although the monopoly situation in some of these markets may have been offset to some degree by issuance of an interim operating authorization ("IOA") to the operator of a neighboring system, no temporary operator can be expected to devote the same attention and resources to a market that a permanent licensee would. Because of the temporary nature of its authorization, an IOA holder would do only what was necessary to improve its competitive position in its own licensed market. If it could meet competition in its own market by extending into the Unlicensed Market from existing cell sites, that would be the extent of its service. No regulatory timetable (e.g., the five-year fill-in

period) or service obligation (e.g., to obtain favorable consideration for renewal of its license) requires anything more from an IOA operator. The service provided under an IOA is likely to fall far short of the service a permanent licensee would typically provide in its market. Thus, CCPR's claim that the "public is already being served" in the market where it holds an IOA is disingenuous. Petition, 5.

There can be no doubt that the most expeditious means of establishing a second facilities-based carrier in the Unlicensed Markets is by using lotteries. The applicant pool is already in place. Indeed, had the Commission held the lotteries announced in the *Lottery Notice*, it might well have already awarded permanent licenses in all six of those markets.

In contrast, if the Commission decides to use auctions to license the Unlicensed Markets, its decision and any licenses awarded by auction will surely face a spirited challenge in court.² Such a challenge would be based upon all of the factors discussed below, including the unlawfulness of the Commission's retroactive legislative rulemaking, the inequitable treatment of the lottery applicants, and the irregularities in the instant proceeding.

Although the Commission might be tempted to risk reversal by the court in order to obtain the windfall for the U.S. Treasury that CCPR suggests auctions will

² CCPR concedes that the Commission has the authority to select licensees for the remaining cellular markets by lottery. Its Petition argues that unlicensed cellular markets do not fall within the scope of the Commission's decision in *Implementation of Section 309(j) of the Communications Act - Competitive Bidding*, 9 FCC Rcd 7387 (1994). Petition, 2.

bring, a pragmatic analysis reveals that the promised windfall is illusory. The enormous differences in the prices bid for virtually the same commodity in the three broadband PCS auctions demonstrates that an auction does not necessarily yield the "market price." Other factors can distort the results of the auction process.³ In any auction of Unlicensed Markets, the Commission cannot expect bidders to ignore the cloud on the licenses it is offering. Any reasonably sophisticated bidder will consider such factors as the potential cost of the litigation needed to clear title to a license, the likelihood of that litigation being successful, the extent of its potential loss in equipment and marketing if it does not prevail in the litigation, and the cost of financing the purchase of the license and/or operations in that market in light of

³ By selling huge market areas (the MTAs) and requiring immediate cash payment of the purchase price, the Commission restricted participation in the auctions for PCS Blocks A and B to a small number of very large companies. Because most of these companies already held cellular licenses in various markets, the actual instances of spirited competitive bidding were rare. As a result, the bidders obtained these licenses at a small fraction of the price that would have been paid had the Commission auction smaller territories and provided payment terms that could have been managed by the many companies interested in participating in those auctions. In the auction for the Block C licenses, the size of the territories and the terms of payment were far more manageable and the resulting bids were many times higher. In the D, E, and F band auction, it appears that prices have been held to low levels by the rule which sets the number of "pops" that a bidder can purchase according to the size of the upfront payment the bidder made with its initial submission. Many bidders who anticipated prices on the same level as the C band auction submitted smaller upfront payments than they would have if they knew that prices would be relatively low. Since the number of potential "pops" that the bidders can buy is restricted, the bidding is less competitive than it would otherwise be.

the risk that the license will be lost.⁴

II. THE USE OF AUCTIONS TO LICENSE UNLICENSED CELLULAR MARKETS WOULD BE BOTH UNLAWFUL AND UNFAIR

Both law and equity require that the Commission hold lotteries to select the licensee for the Unlicensed Markets. To implement auctions at this time would retroactively change the basis of the proceeding for which the applicants filed. Such retroactive rulemaking is inherently suspect and can be engaged in by a regulatory agency only when expressly authorized by Congress. *See Landgraf v. USI Film Products*, 114 S. Ct. 1483 (1994).

The Budget Reconciliation Act of 1994 (the "Budget Act") did not provide such express authorization to the Commission. To the contrary, the Budget Act provided express authorization to the Commission to continue to use lotteries to select licensees where applications had been filed prior to July 26, 1993.⁵ Budget Act Special Rule § 6002(e)(2), 107 Stat. At 397.

The legislative history of the Budget Act shows that Congress had strong reservations about the retroactive imposition of auctions, and intended for the Commission to take such action only in the most extraordinary circumstances.

⁴ No doubt, bidders will consider many factors in addition to the ones mentioned above. For example, bidders will consider the prices paid for PCS frequency in the D, E, and F band auction because at some price level those frequencies may be an acceptable alternative for the cellular Block A license.

⁵ Applications for all of the Unlicensed Markets were filed in 1988 — well in advance of the July 26, 1993 date.

After initially proposing to use lotteries for all applications on file at the Commission, the Congress reversed direction,⁶ stating that auctions should apply only to the licensing of new spectrum and should not change existing licensing procedures.⁷ Congress's reluctance to impose auctions retroactively is further illustrated in its reference to the nine Interactive Video and Data Services markets for which applications had already been accepted as an example of a situation in which lotteries should be continue to be used.⁸ In light of the clearly expressed intent of Congress, the Commission is required to conduct lotteries in cellular markets for which applications were filed prior to July 26, 1993.

Even if lotteries were not required by law, basic fairness would require the Commission to use this form of selection for the Unlicensed Markets. The applicants for these licenses submitted applications and paid the Commission an application fee based on the Commission's promise to select a qualified licensee by lottery from among that group. Contrary to CCPR's claim, the Commission never suggested that the applicants would be entitled to only one drawing, even if the initial selectee proved not to be qualified. Petition, 5. Indeed, in every prior case where the Commission has licensed a cellular market in which the original lottery selectee was disqualified, it has held a second lottery from the original pool of

⁶ See H.R. Report No. 111, 103d Cong., 1st Sess. 253, 262-3 (1993).

⁷ 139 Cong. Rec. S7986m S7995 (daily ed. June 24, 1993).

⁸ H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 498 (1003).

applicants.⁹

In effect, CCPR seeks to penalize the lottery applicants for the fact that the Commission has not yet licensed the Unlicensed Markets. However, nothing could be more unfair. The lottery applicants are hardly to blame for the administrative delay in deciding these cases, or for taking so long to begin a new licensing process after the original selectees had been dismissed.

Certainly, the imposition of auctions would be unfair to the lottery applicants, even if the bidders were restricted to the original applicant pool. The lottery applicants were induced to apply for licenses by the Commission's promise to select licensees by lottery. There was no suggestion when these applications were filed in 1988 that the size of the applicant's pocketbook would determine its chance of becoming a licensee. Lottery applicants that have spent their resources in good-faith reliance on the Commission's rules deserve better treatment from the Commission than the callous dismissal that CCPR would have the Commission accord them.

**III. IF THE COMMISSION DOES USE AUCTIONS TO LICENSE
THE UNLICENSED CELLULAR MARKETS, HOLDERS OF
IOAs MUST BE BARRED FROM BIDDING FOR SUCH
LICENSES**

The Commission should not be misled by CCPR's Petition into relying on CCPR and other holders of IOAs in the unlicensed cellular markets to deliver a

⁹ See, e.g., *Public Notice*, Report No. CL-92-76, released April 9, 1992). (announcing the results of re-lotteries for Unlicensed Markets held on April 8.

windfall for the Treasury by bidding up the prices for the Unlicensed Markets at auction. In fact, CCPR and the other IOA holders are estopped from participating in such auctions by the commitment that they made to the Commission in order to obtain those authorizations.

Each IOA holder affirmatively represented to the Commission that it was not an applicant for the permanent license in that market.¹⁰ Nor was that representation a mere formality that can now be disregarded. Whenever the Commission authorizes interim service, it must balance the public interest in obtaining immediate service against the potential harm to the fair consideration of competing applications. *La Star Cellular Telephone v. FCC*, 899 F.2d 1233, 67 RR 2d 808 (D.C. Cir. 1990). To allow one applicant to operate in a market under temporary authority poses a threat so severe to the principles set forth in *Ashbacker Radio Corp. V. FCC*, 326 U.S. 327 (1945), that it is allowed only where the Commission has considered all other alternatives and found them unworkable. *La Star Cellular Telephone*, 67 RR 2d at 809. In the context of an auction the holder of an IOA would have an advantage so substantial over other applicants —

¹⁰ Although the Commission never promulgated rules for the issuance of IOAs in unlicensed RSAs, its unwavering practice was to consider IOA applications *only* from parties that were not applicants for the permanent authorization. For example, the Commission returned the application of Lake Charles Celltelco for an IOA in Louisiana RSA No. 5 because the owner of the majority partner of that company would not dismiss his application for the permanent license for that RSA. See Letter from Gregory J. Vogt to Stephen Kaffee, dated July 26, 1991, attached as Exhibit A hereto. Cf. *La Star Cellular Telephone Co.*, 4 FCC Rcd 3777, *aff'd*, *La Star Cellular Telephone Co. V. FCC*, 899 F.2d 1233 (D.C. Cir. 1990).

particularly where the IOA has been in place for several years, as is the case for CCPR — that the *Ashbacker* rights of the other applicants would be rendered meaningless if the IOA holder were permitted to compete for the permanent license. Not only would the IOA holder have a unique ability to calculate the actual value of the market through the records of its own operations there, but the market would have higher value to it than to any other bidder because of its existing business operations.

Indeed, all of the arguments that CCPR advances in favor of auctions over lotteries are grounded in the advantage that an IOA holder has over other applicants. Petition, 4-6. It concludes from its willingness to operate in Puerto Rico 2 under an IOA that the license for that market has “auctionable value.” *Id.*, 5. It contrasts its own performance in building and operating the Puerto Rico 2 market under an IOA, to the lottery applicants, many of whom, it claims, had “no operating experience” when they filed their applications eight years ago, *id.*, and who, it claims, are “unlikely to construct their own facilities and provide service to the public. *Id.*, 6. CCPR claims (as the holder of an IOA) that it would be able to assure continuous service to the public, while the lottery applicants might not be “in any position to commence service in the near term.” *Id.*, 5. CCPR even suggests that the Commission should auction the Unlicensed Markets so that IOA holders like itself will not lose their investment and will obtain the license that they deserve far more than any lottery applicant. *Id.*, 4-5.

The principles set forth in *Ashbacher* and the practices that the Commission has followed with respect to issuing IOAs require that the Commission exclude CCPR and other IOA holders from bidding on the markets where they hold IOAs. Since CCPR and the other IOA holders voluntarily represented to the Commission that they were not applicants for such licenses, they should have no cause to complain about such exclusion. Indeed, there is something contemptible in CCPR's effort to extinguish the rights of the lottery applicants after having made such representations to the Commission — much as if a trustee sought to defraud the beneficiaries of the property he was supposed to safeguard on their behalf.

IV. CCPR SHOULD BE DISCIPLINED FOR ITS FLAGRANT VIOLATION OF THE COMMISSION'S EX PARTE RULES

If the goal of CCPR's Petition was objectionable, the way in which it pursued that goal was even worse. In papers filed with the Commission on August 28, 1996 and on September 26, 1996, CCPR's attorney admits to having spoken by telephone with Jackie Chorney, Legal Advisor to Chairman Hundt on August 23,¹¹ and to having met with Rudy Baca, Legal Advisor to Commissioner Quello on August 26, and with Suzanne Toller, Legal Advisor to Commissioner Chong on August 28¹² to urge the Commission to auction rather than to re-lottery the markets listed in the

¹¹ Letter from Sara F. Seidman to William F. Caton, dated September 26, 1996. Ms. Seidman offers no explanation in her letter as to why her contacts with Ms. Chorney were not disclosed in the filing she made on August 28.

¹² Letter from Sara F. Seidman to William F. Caton, dated August 28, 1996.

Lottery Notice. These contacts were flagrant violations of the Commission's rules against ex parte contacts in restricted proceedings.

It had to be plain to CCPR that its contact with the Commissioners' advisors would fall within the definition of ex parte presentations. The contacts were communications "directed to the merits or outcome of a proceeding" under Section 1.1202(a), because their purpose was to persuade Commissioners to cancel the lottery scheduled under the *Lottery Notice*, and to award the license for Puerto Rico 2 and other unlicensed cellular markets by auction instead. The communications were "ex parte" because they were oral and "made without advance notice to the parties to the proceeding and without opportunity for them to be present."¹³

Similarly, CCPR knew or should have known that the licensing proceeding for Puerto Rico 2 and the five other markets in the *Lottery Notice* were and are restricted proceedings in which the rules do not permit ex parte communications. Section 1.1208(c)(1)(ii)(A) of the rules classifies licensing proceeding pursuant to Section 309 as restricted. Section 1.1208(a) prohibits ex parte presentations in restricted proceedings, unless exempted by Section 1.1204(b). Since none of the exemptions in Section 1.1204(b) applies, the application proceedings that the Commission had scheduled for lottery were restricted and any CCI's ex parte contacts were prohibited.

¹³ Given its acknowledged desire to purchase the license for Puerto Rico 2 at auction, CCPR cannot claim that its communications were not a prohibited ex parte presentations because it is not an "interested party." *Chronicle B/casting Co.*, 17 RR 2d 663 (1969).

Indeed, the Public Notice inviting comment on the Petition acknowledged that CCPR had violated the ex parte rules:

... pending application proceedings in the six RSAs identified in the July 12 Public Notice remain restricted pursuant to 47 C.F.R. §1.1208. In this regard, CCPR's petition is deemed an impermissible ex parte presentation to the extent that it relates to the restricted application proceeding for RSA No. 727A, in Ceiba, Puerto Rico.

Public Notice, DA-96-1685 (released October 24, 1996.) Nevertheless, instead of penalizing CCPR for its flagrant violation of the ex parte rules, the Commission has allowed CCPR to reap an extraordinary benefit from its misconduct. Rather than sending CCPR's attorney on her way as soon as the purpose of her contact became clear, the legal advisors to the Chairman and two other Commissioners heard her out and accepted "impermissible" materials. Then, apparently after considering CCPR's ex parte presentation and without affording any party to the licensing proceedings an opportunity to respond, the Commission summarily withdrew the *Lottery Notice*, just as CCPR requested.

It is hard to imagine a scenario more destructive to the integrity of the Commission's decision-making processes than that which has already occurred in this proceeding. To restore at least some vestige of credibility to the Commission's decision-making, it is essential that the Commission attempt to undo the effects of CCPR's misconduct by immediately re-issuing the *Lottery Notice* and initiating appropriate disciplinary proceedings against CCPR.

CONCLUSION

It is no surprise that the only party that will benefit from the instant

proceeding is CCPR. As a result of having persuaded the Commission to act on its unlawful ex parte presentation by withdrawing the *Lottery Notice* and initiating this rulemaking, CCPR has gained months — perhaps years — of operating under its IOA in Puerto Rico 2. The losers are (i) the public in the remaining unlicensed cellular markets, who now face further delay in obtaining service from a second facilities-based cellular carrier; (ii) the lottery applicants, who are also subjected to further costs and delay in seeking to have the Commission conclude licensing the cellular markets where their applications are pending; and (iii) the Commission, which has sacrificed the integrity of its decision-making processes by acting on a flagrantly unlawful presentation and further exacerbated the eight-year delay in licensing the remaining cellular markets.

Respectfully submitted,

CRYSTAL COMMUNICATIONS SYSTEMS

By 
Stephen Kaffee

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November 25, 1996

EXHIBIT A

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

July 26, 1991

In reply refer to:
63500-KVH

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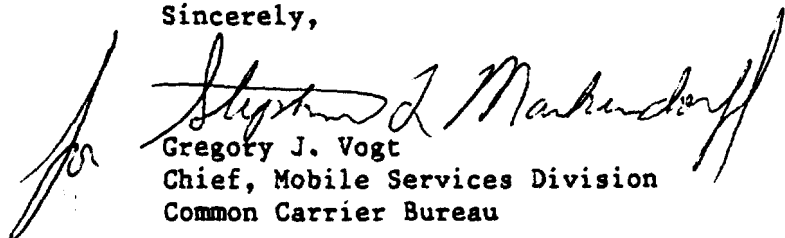
Re: Request for Interim Operating Authority
Lake Charles CellTelCo
File No. 00783-CL-CP-91
Market 458 A, Louisiana 5 RSA

Dear Mr. Kaffee,

In the request for interim operating authority the applicant states that it has no application pending for permanent authority in Market 458 A. The applicant then states that some of applicant's owners do have such applications pending. Please provide detailed information regarding the ownership of the applicant. Also, the applicant must disclose any ownership interest the partners may have in pending applications for permanent authority in Market 458 A. Applications for interim operating authority will only be accepted if there is not an application pending for permanent authority in the RSA.

Failure to respond to this request within 15 days will cause the application to be dismissed by the Commission.

Sincerely,



Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

cc: Lake Charles CellTelCo